

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Commerce, Division of Industrial Compliance

Regulation/Package Title: Wage and Hour, Prevailing Wage Regulations

Rule Number(s): 4101:9-4-02 through 4101:9-4-10; 4101:9-12 through 4101:9-4-18;
4101:9-4-20 through 4101:9-4-21; 4101:9-4-23 through 4101:9-4-28.

Date: 5/11/2017

Rule Type:

☐ New

XX 5-Year Review

☐ Amended

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

Pursuant to Ohio Revised Code section 4115.03 et seq., the rules set forth in Chapter 4101:9-4 of the Ohio Administrative Code sets forth requirements and procedures needed to enforce

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Ohio's prevailing wage law ("the Law"). The Law requires a minimum wage to be paid to laborers, workers, or mechanics that are employed on public improvement construction projects. Prevailing wages are the sum of the employees' hourly rate of pay and other verified fringe benefits like health insurance, vacation pay, and retirement contributions. The wage rates are primarily tied to local collective bargaining agreements that are negotiated between employers and bona fide organizations of labor.

Prevailing wages only apply when there is a public interest in the construction and the project costs exceed thresholds established by law. While there are a number of exceptions to the law, like the exclusion of K-12 construction, the law generally applies to construction undertaken by or for most public entities.

The package contains 23 no-change rules which are being reviewed as part of the five-year rule review process. See "Attachment B" for a rule-by-rule breakdown.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

R.C. 4115.12

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? If yes, please briefly explain the source and substance of the federal requirement.

No. No.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

N/A.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

Pursuant to R.C. Section 4115.12, the Ohio General Assembly passed legislation permitting the Director of Commerce, to adopt rules to facilitate the administration of sections 4115.03 to 4115.16 of the Revised Code, and to achieve the purposes of those sections. The Rules mirror the statutory framework set forth by the legislature and attempt to facilitate a better understanding of the requirements embodied in the law in efforts to promote compliance with the law by contractors, subcontractors, and public authorities.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

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The rules are successful when compliance with the law is high and non-compliance with the law is not the result of vague or ambiguous requirements. The agency charged with enforcing the Law is the Bureau of Wage and Hour, housed within the Division of Industrial Compliance. Wage and Hour is a complaint driven Bureau so we also measure success by lowering the number of complaints received by the Bureau.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

Stakeholders were contacted via e-mail on April 25, 2017.

A list of stakeholders may be found in “Attachment A” of this document.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

The stakeholders are supportive of this entire no-change rule package with a single exception: A single stakeholder suggested modifying the overtime regulations of OAC 4101:9-4-08 (Computation of overtime compensation) to reflect the adopted position of the United States Department of Labor to permit weighted overtime calculations. Weighted overtime calculations permit a contracted to blend rates if multiple rates were paid throughout the course of a work week that required the payment of overtime. The Ohio Department of Commerce already permits weighted overtime calculations. The Division interprets the sentence in OAC 4101:9-4-08, “[t]his rule incorporates the provisions of division (A) of section 4111.03 of the Revised Code and sections 207 and 213 of the federal Fair Labor Standards Act, 29 U.S.C. 207 and 29 U.S.C. 213” to clearly permit the type of calculation sought by the stakeholder and therefore has determined the suggested change to be superfluous and unnecessary.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

N/A. The rules, which are promulgated pursuant to the requirements of R.C. 4115.03 et seq., are created based upon the clear requirements found in the law.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn’t the Agency consider regulatory alternatives?

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The Agency did not consider regulatory alternatives, as the rules have been in place for the prior 5 years without incident, and with the one exception previously discussed, the Industry is supportive of this no-change rule package and suggested no amendments, rescissions, or new rules.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

No. These rules are not appropriate for performance based regulations.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The prevailing wage are specifically authorized by R.C. 4115.12. Commerce conducted a thorough review of the Ohio Revised Code and Ohio Administrative Code to ensure there are no other regulations in place pertaining to these specific rules.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

Commerce will notify the Industry about the rule package. The rules in place for the last 5 years are unchanged so it will be unnecessary to create an implementation plan, where the Agency will simply maintain the status quo. Given the no-change nature of these rules, there will be little to no impact to community served.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

Employers who bid and work on public improvements, as defined within the Law, which are not exempt from the requirements of the law.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

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Employers who wish to bid and work on public improvements as defined within the law, which are not exempt from the requirements of the law, will pay a minimum wage to skilled tradesmen on the jobsite that is equivalent to union scale wages.

Employers must also keep and file certified pay roll reports which verify the hours that each employee works, the wages and fringe benefits paid by the employer for each employee, the name of the project, the public authority and any general/prime contractor on the project by whom the employer was hired. The certified payroll reports must be kept by the employer and submitted to a prevailing wage coordinator on each public improvement. The employer must swear to the veracity of each of the reports filed. In most respects the information that the law requires that employers keep is similar to the information already required by Ohio's Minimum Wage statute. The time investment for employers to create certified payroll reports, instead of merely maintaining employment records as required by Ohio Minimum Wage law, is minimal and difficult to quantify.

Noncompliance with the law could result in employers being held liable for all back wages not paid to their respective employees. Additionally, employers may be subject to penalties amounting to the amount of back wages not paid by the employer. Should the issue of nonpayment become the subject of a legal action in a court with jurisdiction, the employer could also be responsible for the legal costs of the action and for the payment of attorney fees incurred by the prevailing party.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative *business*.” Please include the source for your information/estimated impact.

Since these requirements already exist under current regulations no new adverse impact will result from the proposed rule package. Furthermore, the rules create no new impact on employers that is not specifically set forth in the underlying Law.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The rules, which are promulgated pursuant to the requirements of R.C. 4115.12, are intended to help clarify and elaborate upon the law. The regulations do not have an adverse impact on the business community that was not specifically intended by the underlying legislation.

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Section 4115.12 of the Revised Code requires the Agency to develop rules to facilitate the administration of sections 4115.03 to 4115.16 of the Revised Code. The Agency developed rules that facilitate an understanding of the requirements imposed by the Revised Code to encourage compliance and limit possible adverse impact on businesses.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

A number of factual circumstances do not require the application of the Law to small businesses: sole proprietorships are not subject to the Law; closely held LLCs with only owner/employees are not subject to the Law; smaller projects with costs under statutory thresholds are not subject to the Law; certain occupations that are classified as common labor or do not qualify as construction are not subject to the Law; and work performed offsite is not subject to the Law.

If both the project and the employer are subject to the Law the requirements found in these rules apply evenly to all employers. The Bureau of Wage and Hour makes efforts to inform, educate, and answer questions from small businesses to aid in compliance.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

The compliance and enforcement actions established by these rules do not result in fines or penalties for paperwork violations. A simple and informal notice to correct a paperwork violation has been the only action taken by the bureau in the last 10 years.

18. What resources are available to assist small businesses with compliance of the regulation?

Commerce is easily accessible for information or questions via internet, phone and e-mail. Commerce strives to assist small businesses to maintain compliance with each of the requirements of R.C. Chapter 4115 and O.A.C. Chapter 4101:9-4, through Industry meetings, roundtable sessions, and other outreach events.

ATTACHMENT A

List of Stakeholders

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Department of Commerce

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ATTACHMENT B – Prevailing Wage Regulations Overview

Memorandum

Prevailing Wage Rules Review	Overview of Changes
4101:9-4-02 No change	Definitions – no change
4101:9-4-03 No change	Discharge of prevailing wage obligation – no change
4101:9-4-04 No change	Allowance of contributions to fund, plan, or program – no change
4101:9-4-05 No change	Allowance of fringe benefits – no change
4101:9-4-06 No change	Calculation of credits – no change
4101:9-4-07 No change	Permissible payroll deductions – no change
4101:9-4-08 No change	Computation of overtime compensation – no change
4101:9-4-09 No change	Determination of wage rate schedule – no change
4101:9-4-10 No change	Procedure for requesting wage rate schedule – no change
4101:9-4-12 No change	Duty of public authority to appoint prevailing wage coordinator - no change
4101:9-4-13 No change	Duties of contractors – no change
4101:9-4-14 No change	Obligation of contracts – no change
4101:9-4-15 No change	Employees with multiple job functions – no change
4101:9-4-16 No change	Apprentices, serving laborers, assistants, helpers, and trainees – no change
4101:9-4-17 No change	Scope of project – no change
4101:9-4-18 No change	Construction by public authority with its own employees – no change
4101:9-4-20 No change	Payment – no change
4101:9-4-21 No change	Maintenance, preservation, and inspection of payroll records – no change

Prevailing Wage Rules Review	Overview of Changes
4101:9-4-23 No change	Investigation – no change
4101:9-4-24 No change	Hearings – no change
4101:9-4-25 No change	Procedure for hearings – no change
4101:9-4-26 No change	Subpoenas – no change
4101:9-4-27 No change	Satisfaction of claim – no change
4101:9-4-28 No change	Stop work orders – no change